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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1912.

No. [redacted] 61.

WALLACE WOOD, JR., TRUSTEE IN BANKRUPTCY OF EDWARD D. LECHE, APPELLANT,

vs.

A. WILBERT'S SONS SHINGLE AND LUMBER COMPANY AND FREDERICK WILBERT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED MAY 24, 1910.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 297.

WALLACE WOOD, JR., TRUSTEE IN BANKRUPTCY OF EDWARD D. LECHE, APPELLANT,

vs.

A. WILBERT'S SONS SHINGLE AND LUMBER COMPANY AND FREDERICK WILBERT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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a 1 *Bill of Complaint.*

Filed November 3rd, 1909.

To the Honorable the District Court of the United States for the Eastern District of Louisiana:

Wallace Wood, Jr., Trustee in bankruptcy of the bankrupt estate of Edward Douglas Leche, residing in New Orleans, in the Eastern District of Louisiana, brings this his bill of complaint against (1) A. Wilbert Sons Lumber & Shingle Company, a corporation created under the laws of Louisiana, of which corporation Frederic A. Wilbert is President, and (2) against the said Frederic A. Wilbert, both the company and Frederic A. Wilbert reside in and are found within the Parish of Iberville, La., in the Eastern District of Louisiana, and thereupon your orator complains and says:

(1) That Edward Douglas Leche was adjudicated a bankrupt, in the United States District Court for the Eastern District of Louisiana on the 18th day of May, 1907, and all proceedings against his person and property stayed and prohibited.

(2) On the 30th of May, 1907, your orator, Wallace Wood, Jr., was elected trustee, and on the 5th of June, 1907, he took his oath which was filed by the Referee on the 22nd of June, 1907, and thereupon the trustee, your orator, is charged with the duty of recovering all the property, rights and credits of the bankrupt, Edward Douglas Leche, for the use and benefit of his creditors, and all the rights of action for property rights and credits and all rights to revocatory action which creditors could bring are vested in your orator.

(3) The tangible property placed on the schedule is valued at twenty hundred and sixty-seven dollars ($2067.00) and when sold has realized only eight hundred and thirty-seven dollars ($837), which after paying privileged charges, leaves a balance of only five hundred sixty-three dollars and thirty-seven cents ($563.37), which sum the creditors have directed the trustee to use to uncover
2 the frauds and recover the property, rights and credits of said Edward Douglas Leche hereinafter mentioned. And according to the schedules the said bankrupt owed and owes fifty-six thousand five hundred sixty-three dollars and fifty-five cents ($56,563.55) principal, without calculating accrued interest, and the bankrupt erroneously omitted from his schedule the assets hereinafter mentioned.

(4) Since the 6th of February, 1894, Edward Douglas Leche was indebted and is still indebted, to the firm of R. Beltran & Company in the sum of twenty-three thousand, five hundred and eighty-seven dollars and thirty-two cents ($23,587.32) besides interest, for which sum, with interest, a final judgment was rendered by the 20th Judicial District Court for the Parish of St. James, on the 23rd of June, 1897, No. 1971 of its docket with five per cent interest on

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thirty-two hundred and thirteen dollars and forty-three cents (3213.43) from the 6th of February, 1894; on thirty-three hundred twenty-four dollars and four cents ($3324.04) from August 13, 1895, on sixty-two hundred sixty-five dollars and seventeen cents ($6265.17) from January 25th, 1896, and on nineteen hundred sixty-six dollars and thirty eight cents ($1966.38) from the 31st of January, 1896, and on ninety-eight hundred thirteen dollars and thirty-two cents ($9813.32) from the 4th of January, 1897, until paid, and for costs, aggregating principal and interest up to the date of Edward Douglas Leche's adjudication in bankruptcy on the 18th of May, 1907, the sum of thirty-six thousand eight hundred forty-eight dollars and eighty-one cents ($36848.81).

(5) Pending the said suit of R. Beltran & Company against Edward Douglas Leche, he, Alonzo Landry, his brother in law, and Ursin C. Leche, his son, well knowing that a judgment would be recovered against the said Edward D. Leche by the said firm, entered into an agreement with the said Alonzo Landry, brother-in-law of Edward D. Leche, and they, in order to prevent R. Beltran & Company from enforcing their judgment or collecting the amount thereof, justly due to them, and for the purpose of concealing from his creditors his assets and property, by which the said Ed-
3 ward D. Leche, who was well known in the parishes of Iberville, St. James, Ascension, and other parishes in Louisiana, to be a skillful planter of experience and energy, should buy the Dunboyne Plantation, and at first lease, and later buy Palo Alto Plantation, taking the title in the name of Alonzo Landry, his brother-in-law, who had and has no real interest in the said property or business, in pursuance to said agreement, to protect the assets of said Edward Douglas Leche from the pursuit of his creditors, and especially the R. Beltran & Company, and he being then insolvent in 1897, he raised a crop of rice in the parish of St. James, conducting the business in the name of Alonzo Landry, his brother-in-law, and cleared enough money to buy Dunboyne Plantation, taking the title in the name of Alonzo Landry; on the 17th of January, 1898, he bought an undivided 25th interest in the said Dunboyne Plantation, situated in the Parish of Iberville, on the right bank of the Mississippi River, bounded above by the lands of D. R. Carroll, formerly known as the Palo Alto Plantation and the lands of E. Mary and Landry Bros., and below by lands of Harrel and Koch, upper Emer Plantation, in rear by lands of E. Mary, the Estate of Charles Clements and Levert Bros., from Mary Butler, for the price of one thousand dollars, one third cash and the cash portion on price was paid by said Edward D. Leche, with his own money, and the balance in three notes, which notes he procured the said Alonzo Landry to sign. On the 20th of December, 1907, he bought from A. H. Gay, acting for himself and others, the remaining twenty-four twenty-fifths (24/25) of the said Dunboyne Plantation above described, for the sum of twenty-four thousand dollars ($24000.00) of which the said Edward Douglas Leche paid eight thousand three hundred and thirty-three dollars and thirty-three and one-third cents ($8333.33⅓) with his own money cash, and

caused his brother-in-law, Alonzo Landry, to issue twenty-one promissory notes, six each for eighteen hundred and fifty-one
4 dollars and eighty-five cents ($1851.85) payable two in one year and two in two years and two in three years, and twelve each for the sum of three hundred seventy dollars and thirty-seven cents ($370.37) payable respectively, four in one year, four in two years and four in three years, after date, and three each for one hundred forty-eight dollars and fifteen cents ($148.15) payable in one, two and three years, and on the 2nd of January, 1902, the said Edward Douglas Leche bought from A. Plaisance a certain tract of land in the parish of Iberville and known as the Palo Alto Plantation, which plantation adjoined Dunboyne, for the price of ninety-five hundred dollars ($9500) and said Edward D. Leche paid, with his own money, fifteen hundred dollars, cash ($1500) and the balance in promissory notes, which he caused to be issued by Alonzo Landry, two each for the sum of five hundred dollars and seven each for the sum of one thousand dollars ($1000), and bearing eight per cent interest, the title being taken in the name of Alonzo Landry, as aforesaid, but really being the property of Edward Douglas Leche, and was in his possession and under his control and administration, at that time, until A. Wilbert Sons Lumber & Shingle Company, acting through said Frederic A. Wilbert, in the methods hereinafter described, obtained the possession of said property and apparent title thereto. That thereafter he put many improvements on said property amounting to about fifteen thousand dollars ($15000).

In 1898 the said Edward Douglas Leche informed said Frederic A. Wilbert, the president of said A. Wilbert Sons Lumber & Shingle Company, that he, Edward Douglas Leche, owned Dunboyne Plantation and informed him of the reason that he put it in the name of Alonzo Landry and was conducting the business in the same of Alonzo Landry, and informed him that the two properties were paid for with the money of the said Edward D. Leche. And said Edward D. Leche dealt with said property as his, always acting nominally as agent of Alonzo Landry and to enable Leche more effectually
5 to handle said property as his own, and to mortgage it and deal with it as his own, and to collect all revenues thereof. On the 25th of January, 1898, Alonzo Landry gave to Edward D. Leche an authentic power of attorney, passed before Louis Lozano, then a notary, of Plaquemine, La., and Leche acted under said power and mortgaged the property and signed notes and transacted business as agent, when in fact and truth, it was his own business and all of said transactions being had with consent and approval of A. Wilbert Sons Lumber & Shingle Company, and said Frederic A. Wilbert, the said Leche never rendering any account of his agency to said Alonzo Landry, because the property being really Leche's he owed no account to Landry.

(6) About the year 1898 said Frederic A. Wilbert, president of said company, and A. Wilbert Sons Lumber & Shingle Company being well aware of the true condition of the property and of the facts hereinabove set out, sold to said Leche a large amount of lumber and a sugar mill, well knowing that the property was really

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Leche's property and that he was doing business in the name of Alonzo Landry only to protect his property from his creditors, aforesaid.

In 1906 the said Frederic A. Wilbert, transacting the business in the name of the corporation of which he was president, to-wit: A. Wilbert Sons Lumber & Shingle Company, and being then a creditor of said Leche, and well knowing that on account of the position in which he, said Leche was placed, doing business under cover and in another's name, he could not seek redress at law, resorted to different means to get an unfair preference over the creditors of said Leche and to absorb all the property and assets of the said Edward D. Leche, and to these ends procured said Edward D. Leche to induce said Alonzo Landry on the 19th of January, 1906, to lease to Ursin C. Leche, the Dunboyne Plantation for the sum of three thousand dollars ($3000) and secure from said Ursin C. Leche his promissory note, payable on September 1st, 1906, for three thousand
6 dollars ($3000) to the order of Alonzo Landry, which was endorsed by him and immediately turned over to the said A. Wilbert Sons Lumber & Shingle Company, which note was really without consideration but was, in fact, a lease from Edward D. Leche to himself as his own property, but used as a device suggested by the said Frederic A. Wilbert in order to give an apparent lien on the crop for the said year; and from that time the business of the raising of crops on the said Dunboyne Plantation, was conducted in the name of Ursin C. Leche, the son of Edward D. Leche, but it was well known to the said Frederic A. Wilbert and to said A. Wilbert Sons Lumber & Shingle Company, that it was really the property of the said Edward D. Leche, and at the request and instance of said Frederic A. Wilbert, acting for himself and said A. Wilbert Sons Lumber & Shingle Company, Edward D. Leche leased to a number of Italians, in lots from thirty-five to sixty (35 to 60) acres parts of Palo Alto Plantation, taking notes from them and transferred them to the said A. Wilbert Sons Lumber & Shingle Company. The said A. Wilbert Sons Lumber & Shingle Company received the crops of said rice from the said Edward D. Leche on the said property and sold them and converted them and the proceeds thereof, to their own use, to the amount of twenty thousand and eighty-five dollars ($20,085) and made a partial and incorrect accounting with Ursin C. Leche, who was really an interposed person for the said Edward D. Leche, to their knowledge, and they, the said A. Wilbert Sons Lumber & Shingle Company, through their officers and agents, and said Frederic A. Wilbert, illegally and against equity and good conscience and in order to absorb all of the assets, knowing the said Edward D. Leche was doing business in the name of others, was in such a position that he could not protest or seek legal redress, and he being in the power of the said Frederic A. Wilbert, in addition to the illegal rate of interest charged on items not accounted for, charged on the 7th of July, 1906, ten per cent, to-wit: an item $150, to which they were not entitled; $40 on another item, and ten per cent on
7 all the advances made, and on April 23, 1906, in one sum, an additional charge of twenty-four hundred dollars ($2400)

as interest and collecting further from said Ursin C. Leche the rent note of three thousand dollars ($3000), which was without consideration, and collected from the tenants of Palo Alto Plantation sixteen hundred and eighty dollars making a total of seventy-four hundred and thirty dollars and eighty cents ($7430.80), which the said A. Wilbert Sons Lumber & Shingle Company illegally charged against the said Ursin C. Leche, being the person interposed to their knowledge, for Edward D. Leche, in addition to the items not accounted for and on said false accounting obtained by false representation a draft on Block Bros., for five thousand three hundred thirty-seven dollars and sixty-two cents ($5337.62) which was paid and to which they were not entitled, well knowing that owing to the position in which said Edward D. Leche was placed, doing business under the cover of another's name, he could not seek redress at law, but when he objected to the illegal charges of the said Frederic A. Wilbert, and the said A. Wilbert Sons Lumber & Shingle Company, the said Frederic A. Wilbert told him it was for the protection of said Edward D. Leche, so his creditors, if they discovered the truth, that the property really belonged to the said Edward D. Leche, it would be subjected to the claim of other creditors; that the A. Wilbert Sons Lumber & Shingle Company would apparently have such a large claim as to absorb the property and the said A. Wilbert Sons Lumber & Shingle Company, and said Frederic A. Wilbert, in order — induce Block Brothers to make advances, promised they would not foreclose on the mortgage notes, which they had acquired on the Dunboyne Plantation, and Palo Alto Plantation, and that after making said promises, and after they had promised the Bank of Donaldsonville that the A. Wilbert Sons Lumber & Shingle Company, and said Frederic A. Wilbert, would see that the balance due of twenty-

8 five hundred dollars ($2500) on mortgage given by Edward D. Leche, as agent, and payable to J. M. Rhorer, Jr. for forty-five hundred dollars ($4500) and the Bank of Donaldsonville would be paid and A. Wilbert Sons Lumber & Shingle Company held a note of ten thousand dollars ($10,000.00), which he honestly owed, and they took advantage of this situation to get an unfair preference, making the indebtedness to the bank of Donaldsonville twelve thousand five hundred dollars ($12500.00) with interest, and Doctor M. Galliard, president, and W. D. Park, Cashier, and who well knew that said Edward D. Leche was the owner of the property and the real mortgagor, were induced to foreclose their mortgage, which was in the name of said W. D. Park, which mortgage was really held by the Bank of Donaldsonville and which the said A. Wilbert Sons Lumber & Shingle Company and said Frederic A. Wilbert had bound themselves to pay and they procured W. D. Park to file suit against Alonzo Landry for twelve thousand six hundred and eighty five dollars ($12685.00) with eight per cent interest and five per cent attorneys' fees, No. 638 of the docket of the 21st Judicial District Court, and claiming the recognition of the mortgage on the lands and property of Edward Douglas Leche standing in the name of Alonzo Landry, it being well known to all parties that the property was really that of said Edward D. Leche, and in so

doing said W. D. Park was, in truth and in fact, acting for and as agent of said Frederic A. Wilbert and said A. Wilbert Sons Lumber & Shingle Company, and said Park was then the cashier of the Bank of Donaldsonville, and Alonzo Landry not being the real party in interest, could not defend said suit, or enjoin the said sale. Frederic A. Wilbert for himself and said A. Wilbert Sons Lumber & Shingle Company, fraudulently induced said Edward Douglas Leche not to defend or intervene, and induced Alonzo Landry not to defend said suit on the assurance that they, the said Frederic A. Wilbert and A. Wilbert Sons Lumber & Shingle Company, would buy in the property, clear it of all mortgages and as soon as said Edward D.
9 Leche was discharged in bankruptcy, they would then transfer the property to said Edward D. Leche to whom it really belonged and, under these conditions and promises, secured a judgment by default against Alonzo Landry who was interposed and substituted for Edward Douglas Leche, in the name of Park and the said Frederic A. Wilbert, president of said A. Wilbert Sons Lumber & Shingle Company, caused writs of seizure and sale to issue and caused the said property of Edward D. Leche to be seized and advertised for sale, standing in the name of Alonzo Landry, in the suits Nos. 684 and 686 of the docket of the said 21st Judicial District Court for thirty-five hundred dollars and other sums, aggregating the sum of twenty-five thousand dollars, when no such sums were due, and they obtained an unfair preference on the property of the said Edward D. Leche, well knowing that he had no other property. The said A. Wilbert Sons Lumber & Shingle Company and the said Frederic A. Wilbert, always holding out to the said Edward D. Leche that the result of the proceedings was to be in his interest and that when the property was sold, Leche would get his discharge and they would transfer back to him both Dunboyne and Palo Alto Plantations, clear of all mortgages and incumbrances, and in pursuance thereof, they procured a low assessment of forty thousand seven hundred and fifty dollars ($40750.00) when the property was well worth the sum of sixty thousand dollars ($60,000) and had it adjudicated and sold to A. Wilbert Sons Lumber & Shingle Company at the nominal price of twenty-seven thousand five hundred dollars ($27500), (and Edward D. Leche had invested thirty thousand dollars of his own money in improving it) of which no part of the price was actually paid, but according to the purchase deed, twenty-five thousand four hundred and twenty-one dollars and ninety-five cents ($25421.95) was applied to the payment of the mortgage held by A. Wilbert Sons Lumber & Shingle Company, when no such sum was due on the Dunboyne Plantation, and the balance to the judgment of W. D. Park, which the said Frederic A. Wilbert had promised and agreed to pay. The lands so sold in block are described as follows:

10 A certain plantation, on the west bank of the Mississippi River, known as the "Dunboyne" Plantation, bounded above by the lands formerly belonging to D. R. Carroll, and next described, and lands of E. Mary, formerly, and Landry Bros., and below by lands of A. J. & D. D. Dillon & in rear by lands formerly belonging

to E. Mary Est., Dr. Chas. Clement & Levert Bros., together with all the buildings & improvements thereon being, fixtures, machinery & rights, ways, and privileges and immunities thereto also belonging or in anywise appertaining.

2. Another tract of land, on the west bank of the Mississippi river measuring nine and one-half acres front, on said river by the depths and shapes, thereunto belonging, bounded above by land of Frank Canella and below by the "Dunboyne" plantation above described and being designated as Lot A. on a plan of survey of Palo Alto Plantation on file and of record in the Recorder's Office of the Parish, together with all the buildings and improvements thereon being & belonging, consisting of cotton gin, fixtures, appurtenances and other out houses.

3. A lot of ground on west bank of the Mississippi river and fronting thereon, and adjoining the upper front corner of the "Dunboyne" plantation, measuring front on said river 450 feet by a depth to be measured from the inner line of the present public road, of 150 feet said lot being bounded front by the river above and rear by lands above described, known as lot A. and below by the Dunboyne plantation, with all buildings and improvements thereon, and being a portion of aforesaid lot "A."

Now, your orator shows that instead of transferring said property to Edward Douglas Leche, as defendants promised to do, they have sold off parts thereof to sundry persons, whose names and residence are unknown to your orator, and collected four thousand dollars insurance on the gin, for which they should be held on account. Now your orator has only discovered the fraud and the facts above alleged of fraudulent conspiracy within the last four months, and your orator is informed and believes and so avers, that R. Beltran & Company, and the members of said firm, and the heirs of R. Beltran who now own said claim, and the other creditors of Edward Douglas Leche have no knowledge or information of these said frauds except such as they may have learned from your orator, or his counsel, in investigating the affairs of the bankruptcy of Edward Douglas Leche in the last four months.

The said A. Wilbert Sons Lumber & Shingle Company have already realized forty-three hundred and sixty-nine dollars and twenty cents ($4369.20) from the sale of a part of Palo Alto Plantation and the further sum of twenty-one hundred twenty-four
11 dollars and sixty-five cents ($2124.65) from another part of Palo Alto Plantation, and twenty-one hundred sixty six dollars and forty-five cents ($2166.45) from another part, and ten hundred and fourteen dollars and fifty cents ($1014.50) from another part and nineteen hundred dollars ($1900) from still another part and they have not yet sold all of Palo Alto Plantation, and twenty eight thousand dollars ($28000) from the sale of Dunboyne plantation. And your orator alleges that there is a further accounting due to said Edward D. Leche which orator demanded of said A. Wilbert Sons Lumber & Shingle Company and said Frederic A. Wilbert, but they have refused and persist in refusing to render same to your orator.

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Now your orator hoped that the said Frederic A. Wilbert and the said A. Wilbert Sons Lumber & Shingle Company, would have complied with the just demands of your orator, as in justice and equity they should have done, but so it is that the said Frederic A. Wilbert and the said A. Wilbert Sons Lumber & Shingle Company, and Edward Douglas Leche, Ursin C. Leche and Alonzo Landry, combining and confederating together how to wrong and defraud the creditors of said Edward D. Leche, all of which doings of the defendants are contrary to equity and good conscience and tend to the manifest wrong and injury of the creditors of said bankrupt, Edward D. Leche, and in consideration whereof and for as much as your orator is remediless in the premises by the strict rules of the common law, and can only have relief in a court of equity. Your orator prays that the sale of said lands may be set aside and the defendants and each of them, may be adjudged and decreed to hold such portion of the said lands as are now in their possession in trust for the creditors of said bankrupt, Edward D. Leche, decreed to convey the same to your orator, his trustee in bankruptcy, and to deliver to your orator any deeds, mortgages and they be restrained and enjoined from hereafter setting up
12–16 any claims or title to said lands or any part thereof, and be decreed to account to your orator for all the rents and revenues thereof since the 6th of June 1906, and the proceeds of any such lands as they may have sold and to deliver to your orator all notes, deeds, or securities or bonds they may have received for any such lands, and premiums of insurance and to render a full accounting to your orator, of all transactions had between them and said Edward D. Leche, individually, or through said Alonzo Landry, or Ursin C. Leche, for his account.

May it please your Honors to grant unto your orator a writ of subpœna to be directed to the said A. Wilbert Sons Lumber & Shingle Company, and the said Frederic A. Wilbert, thereby commanding them, and each of them at a certain time and under a certain penalty, personally, to appear before this Honorable Court, and then and there, a full and direct and perfect answer make to all and singular the premises (but not upon oath, the same being expressly waived) and further to stand to and perform and abide such further order, direction and decree therein as this Honorable Court shall seem meet.

(Signed) W. L. HUGHES,
B. R. FORMAN,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

Wallace Wood Jr., trustee in bankruptcy of Edward Douglas Leche, being duly sworn says: that he has read the foregoing bill of complaint subscribed by him, and he knows the contents thereof and all the matters therein stated are stated on reliable information and belief and on investigation, and he believes them to be true.

(Signed) WALLACE WOOD, JR.

Sworn to and subscribed before me, on this 28 day of October, 1909.

(Signed) PETER STIFFT,
[SEAL.] *Not. Pub.*

* * * * * * *

17 *Exception to the Jurisdiction.*

Filed December 3rd, 1909.

U. S. District Court, Eastern District of Louisiana.

No. 14167.

WALLACE WOOD, JR., Trustee,
vs.
A. WILBERT'S SONS LUMBER & SHINGLE CO. et als.

Into the honorable court, Now come the defendants in the above entitled and numbered cause, viz: A. Wilbert's Sons Lumber & Shingle Co., and Frederic Wilbert, solely for the purpose of urging this peremptory exception to the jurisdiction of the Court and for cause of exception, set up and show:

That the defendants are domiciled in the Parish of Iberville, State of Louisiana, and this Court is without jurisdiction over the person of said defendants and over the subject matter of this litigation.

Wherefore, exceptors pray that this exception may be sustained and the demand of the plaintiff dismissed, and as in duty bound, exceptors pray for costs and for all general relief in the premises.

(Signed) C. S. HEBERT,
" E. B. TALBOT,
Att'ys for Exceptors.

* * * * * * *

18 *Demurrer to the Jurisdiction.*

Filed December 13th, 1909.

U. S. District Court, Eastern District of Louisiana, New Orleans Division.

No. 14167.

WALLACE WOOD, JR., Trustee,
vs.
A. WILBERT'S SONS LUMBER & SHINGLE CO. et als.

Demurrer of A. Wilbert's Sons Lumber & Shingle Co., and Frederic Wilbert, to the Bill of Complaint of Wallace Wood, Jr., Trustee, the Above Named Complainant.

This defendant by way of amendment to the form of demurrer filed herein on Dec. 3, 1909, not waiving but reasserting
19 & 20 same, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's

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bill of complaint contained to be true, in any manner or form therein set forth and alleged, doth demur thereto and for cause of demurrer showeth:

That the defendants are domiciled in the Parish of Iberville, State of Louisiana, and this Court is without jurisdiction over the person of said defendants and over the subject matter of this litigation.

Wherefore, and for divers other good causes appearing in the said bill, this defendant doth demur thereto, and humbly prays the judgment of this Honorable Court, whether they be compelled to make answer to the said bill, and prays to be hence dismissed, with reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) C. S. HEBERT,
" E. B. TALBOT,
Solicitors for Defendants.

I hereby certify that the above and foregoing demurrer is, in my opinion, well founded in point of law and not interposed for delay.

(Signed) C. S. HEBERT,
Solicitor for Defendant.

* * * * * * *

21 *Decree.*

Filed February 10th, 1910.

UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana, New Orleans Division.

No. 14167.

WALLACE WOOD, JR., Trustee, etc.,
vs.
A. WILBERT SONS LUMBER & SHINGLE COMPANY et als.

This cause came on to be heard at this term upon the demurrer filed by the defendants to the Bill of Complaint herein, and was argued by the counsel for the respective parties, and submitted;

Upon due consideration whereof, and for the reasons assigned in writing, on file herein.

It is ordered, adjudged and decreed that the said demurrer be sustained, and the complainant's bill be dismissed with costs.

Decree rendered January 27th, 1910.

Decree signed February 10th, 1910.

(Signed) RUFUS E. FOSTER, *Judge.*

22 *Opinion of the Court.*

Filed January 27th, 1910.

United States District Court, Eastern District of Louisiana, New Orleans Division.

No. 14167.

WALLACE WOOD, JR., Trustee Edward D. Leche,
vs.
A. WILBERT'S SONS LUMBER & SHINGLE CO. et als.

This is an action by the trustee in bankruptcy to set aside certain transfers of real estate alleged to have been made by the bankrupt in fraud of his creditors, and for an accounting of the revenues of said estate.

The bankrupt resided in the New Orleans Division of this District, and the bankruptcy proceedings were also filed in said District. The defendants are domiciled in the Eastern District of Louisiana but reside in the Baton Rouge Division.

The trustee's pleading is in the form of a bill in equity and defendants have demurred to the jurisdiction of the court, on the grounds that the court is without jurisdiction over the person of defendant, and over the subject matter of the litigation.

If this court is without jurisdiction over the subject matter it is unnecessary to go into any other question. From the oral arguments and brief filed it is evident the trustee brings his action under the provisions of section 70, sub-division *e*, of the bankruptcy act, and the bill does not disclose any cause of action under either section 60, sub-division *b*, or section 67, sub-division *e*, and therefore, by virtue of the authority of Hull vs. Burr 153 Federal, 945, this court has no jurisdiction to entertain the suit except by the consent of the defendant.

23–28 It is urged by complainant, that defendants, by filing a formal appearance, have waived their rights to object to the jurisdiction. It is true that they did enter their formal appearance in the usual way, but at the same time they also filed what they termed a peremptory exception, but which can be treated as a special appearance to object to the jurisdiction of the Court.

I consider these two documents should be contrued together, and that, giving them the greatest possible weight they cannot be construed to be a consent, on the part of the defendants, to submit themselves to the jurisdiction of this Court.

The bill will, therefore, be dismissed without prejudice to complainant.

* * * * * * *

29 *Petition and Order for Appeal.*

Filed May 6th, 1910.

In the District Court of the United States for the Eastern District of Louisiana.

In Equity. No. 14167.

WALLACE WOOD, JR., Trustee in Bankruptcy of Edward D. Leche
vs.
A. WILBERT SONS SHINGLE AND LUMBER COMPANY and FREDERICK WILBERT.

The above Complainant respectfully shows the Court that he is aggrieved by the final decree made and entered on the 27th day of January 1910, and he does hereby appeal from the decree to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and he prays that this appeal may be allowed, and the transcript of the record, proceedings and the papers upon which the said order was made, duly authenticated, may be sent to the Supreme Court of the United States, and that the Court will approve the bond, and sign the citation.

(Signed) WILLIAM LEE HUGHES AND
" BENJAMIN RICE FORMAN,
Solicitors for Complainant.

Let this appeal, be and is hereby allowed.

(Signed) RUFUS E. FOSTER,
U. S. Judge.

May 6, 1910.

30–32 *Assignment of Errors.*

Filed May 6th, 1910.

In the District Court of the United States for the Eastern District of Louisiana.

In Equity. No. 14167.

WALLACE WOOD, JR., Trustee in Bankruptcy of Edward D. Leche,
vs.
A. WILBERT SONS SHINGLE AND LUMBER COMPANY and FREDERICK WILBERT.

Assignment of Errors.

Now comes the Complainant, Wallace Wood, Trustee in bankruptcy of Edward Leche, and says that in the Record and proceed-

ings of the said Court in the above named and entitled cause, and in the final decree made and entered herein on the 27th day of January, 1910, there is manifest error. That the Court erred in holding that the District Court of the United States for the Eastern District of Louisiana had no jurisdiction of the cause ratione materiae, without the consent of the Defendant in the cause. Therefore, the Court erred in sustaining the demurrer to the jurisdiction of the Court, and directing that the bill of complaint be dismissed.

Wherefore, Complainant prays that the said decree be reversed.

(Signed) WILLIAM LEE HUGHES AND
" BENJAMIN RICE FORMAN,
Solicitors for Complainant.

* * * * * * *

33–38 *Certificate of Judge.*

Filed May 6th, 1910.

In the District Court of the United States for the Eastern District of Louisiana.

In Equity. No. 14167.

WALLACE WOOD, JR., Trustee in Bankruptcy of Edward D. Leche,
vs.
A. WILBERT SONS SHINGLE AND LUMBER COMPANY and FREDERICK WILBERT.

I, Rufus E. Foster, District Judge, in the District Court of the United States for the Eastern District of Louisiana, do hereby certify that in the cause No. 14,167, of the docket of this Court, entitled "Wallace Wood, Trustee in Bankruptcy of Edward Leche, vs. A. Wilbert Sons Shingle and Lumber Company and Frederick Wilbert", that the sole question decided by me was that the District Court did not have jurisdiction ratione materiae without the consent of the Defendant, and I certify the said cause to the Supreme Court of the United States on the question of jurisdiction alone, as to whether or not this Court has jurisdiction in behalf of the Trustee in Bankruptcy to recover the assets of the Bankrupt from a third person under a revocatory action allowed under the laws of Louisiana, of an insolvent, without the consent of the Defendant, under the Bankrupt Act as amended in 1903. And I sustain the demurrer, and dismiss the bill solely on that ground.

(Signed) RUFUS E. FOSTER, *Judge.*

May 6/10.

* * * * * * *

OOR COPY

39 To the Honorable Supreme Court of the United States:

WALLACE WOOD, JR., Trustee in the Bankruptcy of Edward Lesche,
vs.
A. WILBERT AND SONS LUMBER AND SHINGLE COMPANY and FREDERICK WILBERT.

It is hereby agreed that for the purpose of hearing this case only, the following parts of the record need be printed:

1. Bill of Complaint.
2. Original & Amended Demurrer to the jurisdiction.
3. Decree of the Court, sustaining the demurrer.
4. Certificate of the Judge.
5. Assignment of errors.

B. R. FORMAN,
W. L. HUGHES,
Solicitors for Appellant.
C. S. HEBERT,
Solicitor for Defendants.

40 [Endorsed:] File No. 22,192. Supreme Court U. S., October Term, 1909. Term No. 966. Wallace Wood, Jr., Trustee, etc., Appellant, vs. A. Wilbert's Sons Shingle & Lumber Company et al. Stipulation as to parts of record to be printed. Filed May 27, 1910.

[Endorsed:] No. 14,167. U. S. District Court, Eastern District of Louisiana, New Orleans Division. Wallace Wood, Jr., Trustee of Edward D. Leche, B'k'pt, vs. A. Wilbert's Sons Lumber & Shingle Co. and Frederic A. Wilbert. Transcript of the Record.

Endorsed on cover: File No. 22,192. E. Louisiana D. C. U. S. Term No. 297. Wallace Wood, Jr., trustee in bankruptcy of Edward D. Leche, appellant, vs. A. Wilbert's Sons Shingle and Lumber Company and Frederick Wilbert. Filed May 24th, 1910. File No. 22,192.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 297.

WALLACE WOOD, JR., TRUSTEE IN BANKRUPTCY OF EDWARD D. LECHE,

Appellant,

versus

A. WILBERT'S SONS SHINGLE AND LUMBER COMPANY, AND FREDERICK WILBERT,

---

Brief for Plaintiff and Appellant.

This is an appeal by plaintiff from a decree of the United States District Court for the Eastern District of Louisiana sustaining a demurrer to the jurisdiction of

the Court and dismissing the bill. The District Judge certifies:

> "That the sole question decided by him was that the District Court did not have jurisdiction **ratione materiae,** without the consent of the defendant, and I certify the said cause to the Supreme Court of the United States on the question of jurisdiction alone, as to whether or not this Court has jurisdiction in behalf of the trustee in bankruptcy to recover the assets of the bankrupt from a third person through the revocatory action allowed under the laws of Louisiana, of the insolvent without the consent of the defendant, under the bankrupt act as amended in 1903, and I sustain the demurrer and dismiss the bill on that ground.
>
> (Signed) "Rufus E. Foster.
> "Judge."

(Trans., p. 13.)

The bill alleges in substance:

(1). The adjudication in bankruptcy of Edward Douglas Leche, in the U. S. District Court, Eastern District of Louisiana, where he resided.

(2). Plaintiff had been elected and qualified as trustee.

(3). Edward Douglas Leche since 6th February, 1894, had been, and is still indebted to the firm of R. Beltran & Company in the sum of $23,587.32, besides interest and costs, aggregating at the time of his adjudication in bank-

ruptcy, $36,848.81 for which that firm had obtained judgment in the State Court.

That Edward Douglas Leche in order to defraud his creditors, had put his property beyond their reach, had with his own money and intending to buy for himself, bought valuable plantation property, taking the title in the name of Alonzo Landry, his brother-in-law, and at the same time obtained from Alonzo Landry a general and special power of attorney to buy, sell, mortgage and manage the property. The details of each transaction are stated in the bill and not necessary to enumerate here. That the defendants knew of these facts, and entered into a fraudulent conspiracy with Leche and Landry to defraud Leche's creditors, until finally, defendants, by fraudulent and false accounts, and fictitious proceedings detailed in the bill, got the apparent legal title of all of Leche's property which he had bought in Landry's name and stood on the records of the Parish as Landry's until defendants, by fraudulent practices and promises to shield Leche from the pursuit of his creditors, and to hold the property for Leche, obtained, by fraud, possession and apparent legal title to all of Leche's valuable property, part of which defendants had sold for $4,369.00, $424.65 and $1,014.50, and the prayer is that the sales and conveyances by defendants be set aside and annulled and it be decreed that defendants hold the unsold lands in trust for the creditors of the bankrupt, and to account for the rents and the proceeds of the parts sold, and for general relief. (Tr., pp. 1 to 8.)

On 3rd December, 1909, defendants excepted to the jurisdiction as though it was a suit at law in the State

Court (Tr., p. 9), without complying with the 31st rule in equity, and plaintiff moving to strike out said exception and to take the bill for confessed. On 13th December, 1909, defendants filed a demurrer to the jurisdiction of the Court (Tr., pp. 9 and 10), but did not comply with equity rule 31, in that they did not make affidavit that the demurrer was not interposed for delay.

If the question had been raised by a proper demurrer in compliance with equity rule 31, the question remains; has the United States District Court for the Eastern District of Louisiana, sitting in bankruptcy, or as a Court of Bankruptcy, jurisdiction under the provisions of the Bankrupt Act as amended in 1903, of a suit by the trustee to recover property of the bankrupt in the possession of a third person, without the defendant's consent?

Defendants by these fraudulent measures obtained the legal title and the possession of all of Leche's property, agreeing to hold it for him and to hold off all creditors, and after he got his discharge in bankruptcy they were to transfer these valuable plantation properties to him, so the defendants held the property for him and for his benefit, and, after they absorbed his property, repudiate their agreement with him.

The Second Section of the Bankruptcy Act says:

> "The District Courts of the United States are Courts of bankruptcy and shall have jurisdiction." (paragraph 7), "to cause the assets of the bankrupt to be collected reduced to money and distri-

buted, and determine controversies in relation thereto, except as herein otherwise provided."

And Section 23, as originally written, enacted:

> "United States Circuit Courts shall have jurisdiction of all controversies at law and equity, as distinguished from proceedings in bankruptcy between the trustee as such, and adverse claimants concerning property acquired or claimed by the trustee, in the same manner and to the same extent only, as though bankruptcy proceedings had not been instituted and such controversy had been between bankrupts and such adverse claimants." Paragraph b: "Suits by the trustee can only be brought or prosecuted in Courts where the bankrupt whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted unless by consent of the proposed defendant."

This paragraph b was held to qualify the general jurisdiction in the second section of the act, in **Bardes vs. Hawarden Bank, 178 U. S. 524.**

Now, Congress, apparently, to meet the difficulties in that case, amended Section 23-b, so as to read as follows:

> "Suits by the trustee shall only be brought or prosecuted in the Courts where the brankrupt whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted unless

by consent of the proposed defendant, except suits for the recovery of property under Section 60, sub-division b, and Section 67, sub-division e."

Now, some of the aspects of the present case would fall within the terms of Section 60, sub-division b, as amended by the Act of 1903, as follows:

"If a bankrupt shall have given a preference and the person receiving it shall be benefitted thereby, or his agent acting therein, shall have had reasonable cause to believe it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property, or its value from such person. And, for the purpose of such recovery, **any Court of Bankruptcy** as hereinbefore defined (and of course the District Court is a Court of Bankruptcy), and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Section 67, sub-division e, enacted:

"That all conveyances, transfers assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to

purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid, shall, if he be adjudged a bankrupt and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings, or otherwise for the benefit of the creditors. And all conveyances, transfers or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of said debtor by the laws of the State, Territory or District in which the property is situated, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

And the following words were added by the Congress in the Act of 1903:

> "For the purpose of such recovery any Court of Bankruptcy as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Here, again, jurisdiction is given to the District Court as a Court of Bankruptcy.

But it is claimed in argument by the defendants that this present action could only be classed under Section 70, sub-division e, which reads as follows:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of adjudication. Such property may be recovered or its value collected from whoever may have received it, except a **bona fide** holder for value." And the Act of 1903 added these words: "That for the purpose of such recovery, any Court of Bankruptcy as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

The Judge of the United States District Court for the Eastern District of Louisiana, decided this case upon the authority of **Hull vs. Burr, 153 Fed. Rep. 945.** In that case the bankrupt had been adjudicated such in Massachusetts. The trustee had been elected there and was an officer of the Massachusetts Court, and filed his summary petition in the District Court for the Southern District of Florida to recover property which had been conveyed by the bankrupt to Burr as security for a debt. There was no allegation of a fraudulent preference and the petition was not filed in the District Court where the adjudication in bankruptcy had taken place and did not come in any way within the terms of Section 70, sub-division e, and what-

ever is said in that case at page 590 of the report, is clearly **obiter.**

The Judge of the District Court for the Eastern District of Massachusetts, in **Gregory vs. Atkinson, 127 Fed. Rep. 183,** held that in a case where the trustee had filed a bill to annul certain policies of insurance upon the lives of the sons of the bankrupt, which, by their terms, became payable to the bankrupt in the year 1904, that the Court had no jurisdiction because the action was brought under Section 70, sub-division e, which conferred jurisdiction, but this was limited by the phraseology of Section 23 b, which limited jurisdiction in such cases, (as the Court held), to where the defendant consented to the jurisdiction. But this is clearly contrary to the real intent of Congress and makes the special provision and exceptional provision in the amendment to Section 70 e, controlled by the general provisions of Section 23 b. The general rule is that, where an amendment of a statute is special, governing a particular Statute extending the jurisdiction of the District Court to cases brought under Section 70 e, that the special legislation of this character was held to control rather than to follow the general rule. The special amendment governing the general rule.

In **Hurley vs. Devlin, 149 Fed. Rep. 271,** the Court said:

> "Although the identical language employed in extending the jurisdiction of the Federal District Courts over the classes of cases embraced in sub-division 'b' of Section 60 and sub-division 'e' of Section 67 of the act as amended without consent

of the defendant is employed in the amendment to sub-division 'e' of Section 70, yet the law-making power, either through accident or design, failed to except the operation of that sub-division from the general terms of sub-division 'b' of Section 23 of the act. The ultimate question, therefore, is: What is the effect of the amendments so made? Do they preclude this Court from entertaining jurisdiction of this suit? That is, from compelling the appearance of the defendant to this suit in this Court without her consent. This identical question received the consideration of the distinguished District Judge for the Eastern District of Missouri in **Gregory vs. Atkinson (D. C.), 127 Fed. 183,** in which case the jurisdiction of the Court was denied, the reasoning there employed being that the whole act must be so construed as to give effect, if possible, to each of its parts, and as the Congress has had the whole act under consideration when engaged in the determination of what amendments should be made thereto, and as it expressly excepted the provisions of sub-division 'b' of Section 60 and sub-division 'e' of Section 67 from the operation of the general provisions of sub-division 'b' of Section 23 of the act, and did not except subdivision 'e' of Section 70, under which this suit is brought, therefore that sub-division, as amended, should be so construed as to confer full jurisdiction on this Court over the subject-matter of this suit, to be exercised, however, only on consent to jurisdiction of the person of the defendant being given by her. This is also the argument employed by solicitors for defendant in support of her plea.

"We fully recognize the rule of construction which requires an act to be considered as an entirety, complete in all its parts, so that, if possible,

effect may be given to each of its separate sections or parts. I also recognize the force of the argument made in support of the construction claimed, but from a careful study of the original act, the amendments made thereto, and the decision of the Supreme Court which led to the adoption by Congress of the amendments made, I must decline to accept the views stated; and for these reasons.

"**First.** This construction would amount to the absolute nullification of the amendment made to subdivision 'e' of Section 70 of the act now under consideration, and leave it standing precisely as it did prior to the attempted amendment, for it cannot be doubted this suit might, with the consent of the defendant, have been brought and prosecuted in this Court before the act was amended. This was the identical question submitted to and settled by the Supreme Court in **Bardes vs. Hawarden Bank, supra.** Hence it should not be thought the Congress intended to do an entirely useless thing in its attempt to amend the sub-division of Section 70 in question (**Conger vs. Kennedy, 26 Can. Sup. Ct. 404**), and such conclusion does violence to the very rule of construction for which defendant's solicitors contend with so much insistence.

"Again, the language of the amendment is, 'For the purpose of such recovery.' The language is not for the purpose of jurisdiction over the subject-matter of the suit or action, for that, as has been seen, by consent of defendant, the Court already possessed prior to the amendment, but it is for the purpose of such recovery. Before any 'recovery' may be had, as that word is here employed, there must be jurisdiction, not only over the subject-matter of the suit, but as well over the person of the defendant. Full, complete and absolute juris-

diction over both the persons to and subject-matter of a suit must precede the right to a recovery.

"Again, the defendant resides in this State and County, and may be served with compulsory process directed from the District Court of this State sitting within this County, and she might, if the complainants had brought this suit in that Court, have been compelled to litigate with complainants the issues raised by their bill of complaint in such Court of this State regardless of her consent and in the face of her fiercest opposition. Prior to the amendment complainants would have been compelled to resort to that forum; the defendant not consenting to this Court entertaining jurisdiction over her person and her cause. This is also the precise effect of the ruling of the Supreme Court in **Bardes vs. Hawarden Bank, supra.** But the further language of the amendment is: 'This Court (in such a suit as this) for the purpose of such recovery * * * shall have concurrent jurisdiction (with) any State Court which would have had jurisdiction if bankruptcy had not intervened.

"That the State has full, complete and ample jurisdiction over the persons and subject-matter of this suit, if brought therein by complainants without consent of defendant, is not disputed, cannot and will not be denied, because it would have had jurisdiction if bankruptcy had not intervened. This Court, under the amendment made, has concurrent; that is, the like or the same full, complete, absolute, compulsory jurisdiction possessed by the State Court for the purpose of the recovery sought by complainants in this Court. This is the express language of the amendment. It is the latest expression of the legislative will. Later under the rules governing the construction of statutes than

that employed in the amendment to sub-division 'b' of Section 23, because later in point of time; consideration being had to the manner of adopting and amending legislative acts. The provisions of this sub-division of Section 70, it is true, is not expressly excepted from the operation of the general provisions found in sub-division 'b' of Section 23 of the act, but, in my judgment, it is excepted by such necessary implication as to render the construction here given absolutely imperative.

"Again, if further reason for the holding here made should be thought necessary, I might add the language found in Section 23 is general in its nature, and is intended to apply to all classes of cases not excepted from its operation. The language employed in the amendment to sub-division 'e' of Section 70, under consideration, is special, and applies to a particular class of cases therein comprehended. It is a well settled rule of construction of Statutes that the general provisions of an act, when in conflict with special or particular provisions, must yield, and the special or particular provisions prevail.

"For these and other obvious reasons which might be urged, I am of the opinion the clear, positive and unambiguous language employed in the amendment to sub-division 'e' of Section 70 of the act should stand and be given effect by the Courts, although not excepted in express terms from the operation of the general provisions of sub-division 'b' of Section 23 of the act."

And Mr. Remmington, in his last work on bankruptcy, Section 1690, evidently thinks that this decision in the

Hurley case, 149 Fed. Rep. is a correct interpretation of the law.

In **Whitney vs. Weman, 198 U. S. 539,** this Court overruled the decision of the District Court which sustained a demurrer to the bill and dismissed the case for want of jurisdiction, this Court held that the Bankruptcy Court had jurisdiction of a proceeding in the nature of a plenary action brought by the trustee to determine a controversy in relation to property sold by the bankrupt, or other parties for him, and this applies to a suit against parties claiming possession of goods in the bankrupt's store and warehouses under nominal lease from the bankrupt, and in concluding its opinion the Court says:

> "We think the result of these cases is, in view of the broad powers conferred in Section 2 of the Bankrupt Act authorizing a Bankruptcy Court to cause the assets of the bankrupt to be collected and reduced to money and distributed, and to determine controversies in relation thereto, and to bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the Bankruptcy Court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same, and the extent and character of liens thereon or rights therein. This conclusion accords with a number of well considered cases in the Federal Courts." (Citing a number of cases.)

Now in the instant case the bill avers that the defendants had gotten possession of property really belonging

to the bankrupt, by agreeing to hold it for him. They lulled him into security and silence by a promise to transfer the property to him and to hold it for him and agreeing to transfer it to him as soon as he could get his discharge in bankruptcy, thus bringing the cause within the rule of the **Whitney case.**

And in the following cases, jurisdiction has been maintained without the defendant's consent:

Whitney vs. Newman, 198 U. S. 539.
Hawkins vs. Sanderson, 132 Fed. 414-416.
Leeds Woolen Mills, 129 Fed. 922, 926.
Pond vs. N. Y. Nat. Exchange Bank, 124 Fed. 992.
Lawrence vs. Lowrie, 133 Fed. 995.
Delta Natl. Bank vs. Easterbrook, 133 Fed. 521.
36 Statutes at Large, p. 840.

Section 7, amending and re-enacting Section 2 of the Bankrupt Act, par. 23, sub-division b, adding to the exceptions, suits brought under Section 70, sub-division e.

In **Muller vs. Nugent, 184 U. S. 1,** this Court recognized the power of the Bankruptcy Court to compel the surrender of money or other assets of the bankrupt in his possession or in the possession of some one for him, page 552.

In view of the fact that the Act of 1903 was plainly remedial legislation intended to extend the powers of the District Court sitting as a Court of Bankruptcy, and to

meet the objections to jurisdiction which were raised in the case of **Bardes vs. Hawarden Bank**, and to confer upon the District Court sitting as a Court of Bankruptcy, the power to entertain jurisdiction of such a suit as this without reference to the consent of the defendants, it seems to us clear that the judgment of the District Court should be reversed and the cause remanded to be proceeded with on the merits.

In **Hurley vs. Devlin, 151 Fed. 919-924.** Held that the District Court as a Bankrupt Court had exclusive jurisdiction to determine the dower rights of the widow of the bankrupt. (See principles there announced and cases cited.)

In **Skeevis vs. Barthel, 152 Fed. 536,** District Court of Northern District of Iowa. Held, that District Court did not have jurisdiction of actions brought under Section 70, e, without consent of defendant. But this is of course not binding on this Court, and in any event, our contention is that this case falls within the principles of **Whitney vs. Wenman, 198 U. S. 539,** and that **Hurley vs. Devlin 149 Fed. Rep. 268,** was correctly decided.

In **Palmer vs. Roginsky, 175 Fed. 883,** the District Court of Southern District of N. Y., refused to follow **Hurley vs. Devlin, 149 Fed. 268,** and **Remington on Bankruptcy, p. 1040, par. 1689.**

In **Sheppard vs. Lincoln, 187 Fed. 183,** the District Court, Southern District of N. Y., Hazel, Judge, expressed an obiter opinion, that **Palmer vs. Roginsky, 175 Fed. 883,** was correctly decided, and **Hurley vs. Devlin** was erroneously decided, and said the question was an

open one, yet maintained jurisdiction because the defendant had appeared generally and demurred.

In **Harris, Trustee, vs. Bank, 216 U. S. 529**, this Court expressly avoided deciding the question now before the Court for solution in this case.

The properties described in the bill from the time of acquisition were really the property of Edward Leche, the bankrupt, but standing on the records in the name of Alonzo Landry and subsequently put in the name of the defendants, in trust, but still really the property of Edward Leche, under the promise on the part of defendants to transfer the property to him as soon as he got his discharge in bankruptcy.

If the objection is urged here, that the Court, sitting in the New Orleans Division, should not have entertained the cause for the reason that the defendants reside in the Baton Rouge or northern division of the Eastern District of Louisiana, we submit that this question was not decided by the District Court, that Court only deciding the question: could the defendants be sued in either division without their consent. However that may be, the bill was addressed to the District Court of the United States for the Eastern District of Louisiana. That Court has the same Judge, the same Clerk and the same Marshal. If the subpoena was returnable erroneously to the New Orleans division, then the proper motion would have been to quash the subpoena and direct it to be made returnable to the Baton Rouge, or northern Division. It is the error of the Clerk in issuing the subpoena, and if the subpoena is made returnable to the wrong division, that does not

oust the jurisdiction of the Court. The remedy is simply to transfer the bill to the Baton Rouge division, to be heard there, or directing a new subpoena to issue, returnable to the Baton Rouge division. But we do not think that this question is properly before the Court at the present time.

Respectfully submitted,

WILLIAM LEE HUGHES,

BENJAMIN RICE FORMAN,

Attorneys for Plaintiff.

FILED:
NOV 5 1912
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 61.

No. 22,192

WALLACE WOOD, JR., TRUSTEE IN BANKRUPTCY OF EDWARD D. LECHE, APPELLANT,

versus

A. WILBERT'S SONS LUMBER AND SHINGLE COMPANY AND FREDERIC WILBERT, APPELLEES.

Appeal from the District Court of the United States for the Eastern District of Louisiana, Honorable Rufus E. Foster, Judge.

Brief for Defendants, Appellees.

CLARENCE SAMUEL HEBERT,

WALTER GUION,
Solicitors for Defendants and Appellees.

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Supreme Court of the United States

OCTOBER TERM, 1912.

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versus

A. WILBERT'S SONS LUMBER AND SHINGLE COMPANY AND FREDERIC WILBERT, APPELLEES.

Appeal from the District Court of the United States for the Eastern District of Louisiana, Honorable Rufus E. Foster, Judge.

Brief for Defendants, Appellees.

STATEMENT OF THE CASE.

E. D. Leche was adjudged a bankrupt in the United States District Court for the Eastern District of Louisiana on **May 18, 1907.**

Wallace Wood, Jr., was elected trustee of this bankruptcy on **May 30, 1907.** He qualified by taking the required oath on **June 5, 1907.**

On **November 3, 1909,** the trustee filed a bill in equity in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, complaining, substantially, that A. Wilbert's Sons Lumber and Shingle Company and Frederic Wilbert, the President of the company, domiciled in the Eastern District of Louisiana, Baton Rouge Division, had entered into a fraudulent conspiracy with the bankrupt, Leche, and certain other parties named in the bill, by which on **June 6, 1906,** the defendant, A. Wilbert's Sons Lumber and Shingle Company, had acquired title to the Dunboyne and Palo Alto plantations belonging to the bankrupt and situated in the Parish of Iberville, Louisiana, under an agreement to hold said plantations safe from the pursuit of the judgment creditors of the bankrupt, the said "Wilbert always holding out to said Edward D. Leche that the result of the proceedings was to be in his interests and that when the property was sold, Leche would get his discharge and they would transfer back to him both Dunboyne and Palo Alto plantations, clear of all mortgages and incumbrances."

And the bill concludes as follows:

> "Now your orator hoped that the said Frederic A. Wilbert and the said A. Wilbert Sons Lumber & Shingle Company would have complied with the just demands of your orator, as in justice and equity they should have done, but so it is that the said Frederic A. Wilbert and the said A. Wilbert Sons Lumber and Shingle Company, and Edward

Douglas Leche, Ursin C. Leche and Alonzo Landry, combining and confederating together how to wrong and defraud the creditors of said Edward D. Leche, all of which doings of the defendants are contrary to equity and good conscience and tend to the manifest wrong and injury of the creditors of said bankrupt, Edward D. Leche, and in consideration whereof and for as much as your orator is remediless in the premises by the strict rules of the common law, and can only have relief in a court of equity. Your orator prays that the sale of said lands may be set aside and the defendants and each of them, may be adjudged and decreed to hold such portion of the said lands as are now in their possession in trust for the creditors of said bankrupt, Edward D. Leche, decreed to convey the same to your orator, his trustee in bankruptcy, and to deliver to your orator, any deeds, mortgages and they be restrained and enjoined from hereafter setting up any claims or title to said lands or any part thereof, and be decreed to account to your orator for all the rents and revenues thereof since the 6th of June, 1906, and the proceeds of such lands as they may have sold and to deliver to your orator all notes, deeds ,or securities or bonds they may have received for any such lands, and premiums of insurance and to render a full accounting to your orator, of all transactions had between them and said Edward D. Leche, individually, or through said Alonzo Landry, or Ursin C. Leche, for his account.

May it please your Honors to grant unto your orator a writ of subpoena to be directed to the said A Wilbert Sons Lumber and Shingle Company, and the said Frederic A. Wilbert, thereby commanding them, and each of them at a certain time and under a certain penalty, personally, to appear

before this Honorable Court, and then and there, a full and direct and perfect answer make to all and singular the premises (but not upon oath, the same being expressly waived) and further to stand to and perform and abide such further order, direction and decree therein as this Honorable Court shall deem meet." (Tr., p. 8).

On **December 3, 1909,** the return day fixed by the subpoena, counsel for defendants entered their appearance, and simultaneously filed an exception to the jurisdiction, as follows, omitting the number and title of the case, viz:

"Into this Honorable Court, now come the defendants in the above entitled and numbered cause, viz: A Wilbert's Sons Lumber and Shingle Company and Frederic Wilbert, solely for the purpose of urging this peremptory exception to the jurisdiction of the Court and for cause of exception, set up and show:

"That the defendants are domiciled in the Parish of Iberville, State of Louisiana, and this Court is without jurisdiction over the person of said defendants and over the subject matter of this litigation.

Wherefore, exceptors pray that this exception may be sustained and the demand of the plaintiff dismissed, and as in duty bound, exceptors pray for costs and all general relief in the premises." (Tr., p. 9.)

On **December 13, 1909,** the defendants came in by way of amendment to the form of demurrer filed on **December 3, 1909,** and filed the following amended demurrer, the number and title of the case being again omitted:

"This defendant by way of amendment to the form of demurrer filed herein on December 3, 1909,

not waiving but reasserting same, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint contained to be true, in any manner or form therein set forth and alleged, doth demur thereto and for cause of demurrer showeth:

"That the defendants are domiciled in the Parish of Iberville, State of Louisiana, and this Court is without jurisdiction over the person of said defendants and over the subject matter of this litigation.

"Wherefore, and for divers other good causes appearing in the said bill, this defendant doth demur thereto, and humbly prays the judgment of this Honorable Court, whether they be compelled to make answer to the said bill, and prays to be hence dismissed, with reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) C. S. HEBERT,
E. B TALBOT,
Solicitors for Defendant.

"I hereby certify that the above and foregoing demurrer is, in my opinion, well founded in point of law and not interposed for delay.

(Signed) C. S. HEBERT,
"Solictor for Defendant."

(Tr., pp. 9, 10.)

This demurrer was tried before the Honorable Rufus E. Foster, Judge of the United States District Court, Eastern District of Louisiana, in regular order, and on **January 27, 1910,** he sustained it for the following reasons:

"This is an action by the trustee in bankruptcy to set aside certain transfers of real estate alleged

to have been made by the bankrupt in fraud of his creditors, and for an accounting of the revenues of said estate.

"The bankrupt resided in the New Orleans Division of this District, and the bankruptcy proceedings were also filed in said district. The defendants are domiciled in the Eastern District of Louisiana but reside in the Baton Rouge Division.

"The trustee's pleading is in the form of a bill in equity and defendants have demurred to the jurisdiction of the court, on the grounds that the court is without jurisdiction over the person of defendant, and over the subject matter of the litigation.

"If this court is without jurisdicion over the subject matter it is unnecessary to go into any other question. From the oral arguments and brief filed it is evident the trustee brings his action under the provisions of Section 70, subdivision e, of the bankruptcy act, and the bill does not disclose any cause of action under either section 60, subdivision b, or section 67, subdivision e, and therefore, by virture of authority of Hull vs. Burr, 153 Federal, 945, this court has no jurisdiction to entertain the suit except by the consent of the defendant.

"It is urged by complainant, that defendants, by filing a formal appearance, have waived their rights to object to the jurisdiction. It is true that they did enter their formal appearance in the usual way, but at the same time they also filed what they termed a peremptory exception, but which can be treated as a special appearance to object to the jurisdiction of the Court.

"I consider these two documents should be construed together, and that, giving them the greatest possible weight they cannot be construed to be a consent, on the part of the defendants, to submit themselves to the jurisdiction of this Court.

"The bill will, therefore, be dismissed without prejudice to complainant." (Tr., p. 11.)

From this judgment dismising their bill for want of jurisdiction **rationae materiae**, complainants appealed to this Honorable Court on **May 6, 1910.** Their appeal was filed in the Supreme Court on **May 24, 1910.**

ARGUMENT.

I.

Equity Rule XXXI Not Applicable.

In their learned brief filed in this Court the solicitors for the coplainant, for the first time, make the point that the demurrer of the defendants was not in accordance with equity rule 31 in that no affidavit accompanied it to the effect that the demurrer was not interposed for delay and they state that they moved to strike out the exception filed **December 3, 1909,** and have the bill taken for confessed.

In so far as concerns the lack of an affidavit, the bill specially waives it. But if this was not true, it would be too late to make the point by brief in this Court.

The record shows that no motion to strike out the exception to the jurisdiction and to take the bill for confessed was ever filed. The learned gentlemen on the other side have fallen into error in this particular.

The exception to the jurisdiction was filed through error on the part of the defendant's counsel as to the nature of the action. As soon as this error was discovered, an amended demurrer was filed within ten days, and before any action had been taken on the original plea, so as to make the demurrer conform to the equity practice.

It is a well known rule of equity pleading that a timely amendment as to form is always admissible. The exception filed on **December 3, 1909**, the day of appearance of counsel for defendants, served to register the objection of defendants to the jurisdiction of the Court and it is untenable to hold that an appearance for such a purpose can serve as a basis for a plea of jurisdiction by consent.

II.

U. S. District Court Without Jurisdiction.

This suit is the revocatory action, finding its basis in the Revised Civil Code of Louisiana, Articles 1970 **et sequens.**

The jurisdiction, or lack of jurisdiction, of this Court must be determined by the provisions of Section 23b and Section 70, subdivision e, of the bankruptcy act as they existed at the time the bill was filed, that is on **November 3, 1909.**

In the case of Harris, Trustee, vs. First National Bank of Mt. Pleasant, 216 U. S. Reports, page 383, Mr. Justice Day, in delivering the opinion of the Court, stated fully and concisely the amendments of 1903 to the national bankruptcy act. The Court in that case did not decide

the question here involved, but we quote the opinion for the purpose of getting the statement of the amendments as to the jurisdiction there made

> "In Bardes vs. Hawarden Bank, 178 U. S. 524, this court held that under Section 23 of the bankruptcy act of 1898 the District Court of the United States could by the consent of the defendant, and not otherwise, entertain suits by the trustee against third persons to recover property conveyed by the bankrupt before the institution of proceedings in bankruptcy.
>
> "Subsequently, Congress, by act of February 5, 1903, 32 Stat. 797, c. 487, amended certain portions of the bankruptcy act. To Section 23b, which provided that suits by the trustee should only be brought in courts where the bankrupt, whose estate was being administered by the trustee, might have brought them if proceedings in bankruptcy had not been instituted, unless by the defendant's consent, these words were added: **'Except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.'**
>
> "Subdivision b of section 60, made provision for the recovery of preferences given by the bankrupt within four months before the filing of the petition in bankruptcy. To that subdivision these words were added: **'And for the purpose of such recovery, any court of bankruptcy as hereinbefore defined, and any State Court which would have jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.'**
>
> "Subdivision e of Section 67 made provision for setting aside fraudulent conveyances, and the recovery of property so conveyed at the suit of the trustee. To that subdivision these words were ad-

ded: **'For the purpose of such recovery any Court of bankruptcy as hereinabove defined and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.'**

"A consideration of these amendments, having reference to the recovery of preferences and of property fraudulently conveyed, shows that they cannot include the action under consideration here. Nor is it claimed that they are sufficient of themselves to authorize the present suit. Reliance is had on the amendment made by the Act of February 5, 1903, of subdivision (e) of Section 70. We give that subdivision, putting the amendment in italics.

" 'e. The trustee may avoid any transfer by the bankrupt of his property which any creditor might have avoided, and may recover the property so transferred, or its value, from the person to whom it was tranferred, unless he was a **bona fide** holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a **bona fide** holder for value. **For the purpose of such recovery any Court of Bankruptcy as hereinbefore defined and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.'**

"It is to be noted that Section 70 subdivision (e), is not mentioned in the amendment to Section 23, enlarging the jurisdiction of the Federal Court to entertain suits without the consent of the defendant. And it has been held that suits under Section 70 subdivision e, can only be brought in a Court of bankruptcy with the consent of the defendant. **Hull v. Burr, 153 Fed. Rep .945.** The contrary view

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was taken in **Hurley et al v. Devlin, 149 Fed .Rep. 268.**

"But we do not find it necessary to pass upon that question. Assuming for this purpose that actions may be brought by trustees in the Courts of bankruptcy in cases coming within the terms of Section 70, subdivision (e) without the consent of defendant, we do not think that the present action is one of that character."

Since the institution of this suit, and in fact since the filing of this appeal in the Supreme Court of the United States, viz: on **June 25, 1910,** the bankruptcy act was further amended by Congress in Section 23b, which now reads as follows, the words in black-letter being the latest amendment:

"Sec. 7. That section twenty-three, subdivision (b), of said Act as so amended be, and the same hereby is, amended so as to read as follows:

"Suits by the trustee shall only be brought or prosecuted in the Courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of proposed defendent, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; **and section seventy, subdivision e."**

36 Statutes at Large, p. 840.

And the following provision was incorporated in the amendment of 1910, which has an important bearing on this case, viz:

"Sec. 14. That the provisions of this amendatory act shall not apply to bankruptcy cases pend-

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ing when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said act approved July first, eighteen hundred and ninety-eight, as amended by said act approved February fifth, nineteen hundred and three, and as further amended by said act approved June fifteenth, nineteen hundred and six."

36 Statutes at Large, p. 841.

Under the Bankruptcy Act of 1898 considerable confusion existed as to the jurisdiction of the bankrupt Courts with reference to suits brought by trustees to set aside fraudulent transfers and preferences made by the bankrupt to third parties before the institution of proceedings in bankruptcy. These questions were all set at rest in the case of **Bardes v. Hawarden Bank, 178 U. S. Reports, p. 524**, where this Court, through Mr. Justice Gray said (syllabus):

"The provisions of the second clause of Section 23 of the Bankrupt Act of 1898 **control and limit** (our black-letter) the jurisdiction of all Courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.

'The District Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy."

It will be noted here that your Honors have laid down the doctrine that the second clause of Section 23 of the Bankrupt Act of 1898, **controls and limits** the jurisdiction of all Courts. This language by this Court becomes important in the discussion of the present case, because our opponents in their able brief, following the reasoning of Judge Pollock in **Hurley v. Devlin**, 149 Fed. Rep. 263, contend that "the language employed in the amendment to subdivision "e" of Section 70, under consideration, is special, and applies to a particular class of cases therein comprehended. It is a well settled rule of construction of statutes that the general provisions of an act, when in conflict with special or particular provisions, must yield, and the special or particular provision prevail."

This decision of Judge Pollock, a learned Judge of the United States District Court, and the argument of counsel, along the same lines fail to take into consideration the fact that the amendment to Section 70, subdivision e, passed in 1903 confers jurisdiction for such recovery on any Court of Bankruptcy **"as hereinbefore defined."** And this limitation, **"as hereinbefore defined"** takes us back to Section 23b, of the amended act, where the jurisdiction is in fact accurately defined and limited to suits under subdivision b of Section 60, and subdivision e of Section 67, unless jurisdiction vests in other cases by consent.

Section 23b, subdivision b of Section 60, subdivision e of Section 67 and subdivision e of Section 70 of the Bankruptcy Act as amended in 1903, are parts of a law **in pari materia** and must be construed together. This history of the amendment of 1903 to the act of 1898 shows that the Pay Bill as it passed the House made Section 23b include

suits under Section 70, subdivision e as coming within the jurisdiction of the United States Courts, without the consent of the defendant. This provision was stricken out in the Senate and the amendment to that effect was accepted by the House, leaving the jurisdiction of the United States Courts under Section 70, subdivision e to vest only by consent of the proposed defendant. The amendments of 1903 must be so read as to give effect to all the changes made in the law. And such a result can only be reached by reading the amendments together and concluding that Congress intended to give the United States Courts jurisdiction without the consent of the defendant under subdivision b of Section 60, and subdivision e of Section 67, and with the consent of the defendant under subdivision e of Section 70.

This is the only reasonable construction that can be given the Amendments of 1903, especially in view of the language employed by the Supreme Court of the United States in **Bardes v. Hawarden Bank**, where it was held that Section 23b **controls and limits** the jurisdiction of all bankrupt Courts. Section 23b, therefore, controls and limits subdivision e of Section 70.

There have been a number of decisions by the lower United States Courts on the question involved in this case. All such decisions have been against the jurisdiction of the bankruptcy Courts, under Section 70, subdivision e, as amended in 1903, unless by consent with the exception of the foregoing decision by Judge Pollock in the case of **Hurley v. Delvin**. Of course, none of these decisions are binding on this Court, to which the question has never heretofore gone, excepting in the case of **Harris, Trustee v. First National Bank of Mt. Pleasant**, quoted **supra**,

where this Court declined to pass on the question here presented.

But while these decisions are not binding upon this Court, the opinions present the views of learned and experienced Judges and Courts and may help this Court to reach a correct conclusion in the case now under discussion.

The most important of these decisions is the one by the Circuit Court of Appeals, Fifth Circuit, Pardee, McCormick and Shelby, Judges, in which his Honor, Judge Shelby, delivered the very able opinion of the Court. The case was **Hull v. Burr, 153 Fed. Rep. 945,** relied upon by the learned Judge of the District Court in the conclusion he reached in this case. Judge Shelby reasons the question out as follows:

> "The opinion of the Supreme Court in **Bardes v. Hawarden Bank,** construing the act as it stood before the amendment seems to us conclusive of the proposition that the Court of Bankruptcy did not have jurisdiction of the case made by the petition, if the petition presents a controversy at law or in equity within the meaning of Section 23 of the act.
>
> "Does the Amendment of 1903 affect the case at bar? The amendment makes exceptions to the limitation on the jurisdiction of the District Courts, and thereby extends their jurisdiction; but the extension does not include cases like that presented by the petition of the trustee. The amendment confers jurisdiction on the District Courts in 'suits for the recovery of property under section

sixty, subdivision b, and section sixty-seven, subdivision e.' Turning to Section 60, we find that subdivision 'b' provides that the trustee may sue the person receiving a preference and recover property or its value. Under the amendment, suit for that purpose may be brought in 'any court of bankruptcy.' The case at bar involves no question of preference. Examining Section 67, sudbivision 'e,' we find that it relates to fraudulent conveyances by the bankrupt and conveyances made within four months prior to the time of filing the petition in bankruptcy. The amendment confers jurisdiction on any court of bankruptcy of suits to recover property so conveyed. The petition of the trustee in the case at bar contains no charge of fraud, and the deed and contracts in question were executed more than four months before the beginning of the bankruptcy proceedings. It follows that the amendment quoted has no application to this case. The case, when viewed as a controversy at law or in equity,not being affected by the amendment, must be governed by the principles announced in **Bardes v. Hawarden Bank, supra,** which denies the jurisdiction of the District Court.

"2. The only other part of the act that might be referred to in this connection is Section 70, subdivision 'e.' We quote it here, placing the part of it added by the Amendment of 1903 in italics:

" '(e). The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may re-

cover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of such adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. **For the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.** 30 Stat. 566, c. 541 (U. S. Comp. St. 1901, p. 3452), amended by Act Feb. 5, 1903, c. 487, par. 16, 32 Stat. 800 (U. S. Comp. St. Supp. 1905, p. 690).'

"Such jurisdiction as is conferred by this language relates to suits by the trustee to 'avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided.' The petition of the trustee in the instant case does not seek to avoid a transfer. It does not allege that the deed to Hull was made under circumstances that made it voidable at the suit of his creditors. In fact, it is not alleged in the petition that the corporation owed any debts at the date of its transfer to Hull. No charge of fraud against creditors is made. On the contrary, it is alleged that the deed to Hull was based on a large consideration, not less than $25,000. A careful consideration of the trustee's petition convinces us that it was not intended as a suit under Section 70e. and that subdivision has not been cited by learned counsel for the trustee as conferrring jurisdiction.

"But there is another reason why Section 70e cannot be relied on as giving the Court below jurisdiction in this case. Subdivision 'b' of Section 23 provides that trustees shall sue only in the Courts where the bankrupt might have brought suit, if proceedings in bankruptcy had not been instituted, 'unless by consent of the proposed defendant.' This limitation is general in its term, embracing all suits. Congress, by the Amendment of 1903, excepted from this limitation certain suits which may now be brought in the bankruptcy Courts without the consent of the defendant. The suits excepted are 'suits for the recovery of property, under Section 60 ,subdivision 'b,' and Section 67, subdivision 'e.' The statute requiring 'the consent of the proposed defendant' stands as enacted, with no other exception than the one named. If the exception had included suits for the recovery of property under Section 70, subdivision 'e,' then, clearly, suits under that subdivision could have been brought by the trustee in a Court of bankruptcy without the consent of the defendant. It is stated by Collier, in his work on Bankruptcy (5th Ed., p. 266), that the amendment was at first so written, but that the Senate Judiciary Committee struck out Section 70, subdivision 'e.' The act, as it was passed by Congress, leaves suits under that subdivision still subject to the provision of Section 23b, requiring the consent of the proposed defendant. Construing Section 70e in connection with Section 23b, it appears that the former conferred jurisdiction on Courts of bank-

ruptcy of suits to avoid transfers of his property made by the bankrupt which any creditor of the bankrupt might have avoided, but that, although jurisdiction of the subject-matter is conferred, it can only be exercised over the persons of the defendants by their consent. The reasons for this conclusion are clearly and ably stated by Judge Adams, in **Gregory v. Atkinson (D. C.) 127 Fed. 183, 185.**

"Even if the trustee's petition was construed as presenting a case under Section 70, subdivision 'e,' the Court of bankruptcy would not have jurisdiction without the consent of the defendant."

Our learned opponents contend that the decision of the question here presented in the case of **Hull v. Burr** was **obiter,** inasmuch as the Court of Appeal had already disposed of the case on another question and it was, therefore, unnecesary to pass on the question of jurisdiction under Section 70, subdivision e. We cannot agree that the decisision of the question in **Hull v. Burr** was **obiter.** The question was before the Court and no doubt had been fully argued. The fact that the case was disposed of on another question does not preclude the Court from discussing and deciding issues before it and such discussion and decision are not **obiter.**

The opinion of Judge Adams, U. S. District Court, E. D. of Missouri, in the case of **Gregory v. Atkinson, 127 Fed. Rep. 184,** is illuminating. He said:

"Prior to the amendment of 1903 the District Court could entertain jurisdiction over suits brought by trustees in bankruptcy to set aside

fraudulent conveyances, by the proposed defendant's consent, and not otherwise. Such was the construction placed on the act by the Supreme Court of the United States. **Bardes vs. Hawarden Bank, 178 U. S. 524, 539, 20 Sup. Ct. 1000, 44 L. Ed. 1175.** In the light of the opinion in that case, Congress amended, subdivision 'b' of Section 23 by adding the words, 'except suits for the recovery of property under Section 60b, and Section 67e.' By this section, as amended, Congress, in my opinion, intended to, and did, confer jurisdiction without the consent of the proposed defendant in cases contemplated in the exception, namely, those for the recovery of preferential payments provided for by Section 60b, and to set aside fraudulent conveyances provided for by Section 67e, provided the payments or the conveyances were made within four months prior to the filing of the petition for adjudication. In all other cases I think the law is left as it was prior to the amendatory act.

"Section 70e, as amended, clearly enough confers jurisdiction upon this Court over the subject-matter of fraudulent conveyances in violation of state statutes irrespective of the time when made. But does it go further, and confer jurisdiction over the persons of the defendants without their consent? In very emphatic language Congress, by Section 23b, laid down a general and comprehensive rule to the effect that suits by the trustee shall only be brought or prosecuted in the Courts where the bankrupt might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, except by consent of the proposed defendants. To this general rule two exceptions already referred to are expressly made. If Congress had intended to except from this general rule all actions to set aside fraudulent conveyances, as con-

templated by Section 70e, no reason is apparent why it did not, in terms, except such actions from the operation of the general rule, there laid down. Its attention was called to the subject, and it legislated on that subject. Under such circumstances, it is reasonable to conclude that it expressly mentioned all of the exceptions it intended to make. The amendment of February 5, 1903, conferring jurisdiction upon Courts of bankruptcy, in common with state Courts, for the recovery contemplated by Section 70e, must, in my opinion, be read in connection with Section 23b, and, when so read, means that jurisdiction over the subject-matter of Section 70e is conferred upon this Court, but can be exercised only on the condition imposed by Section 23b, of securing the consent of the proposed defendants. This conclusion is re-enforced by the fact that, notwithstanding jurisdiction is conferred upon this Court by Section 23b to recover preferential payments and cancel fraudulent conveyances made within four months prior to bankruptcy proceedings without the consent of the proposed defendants, yet Congress, out of abundant precaution, saw fit in both Sections 60b and 67e to expressly provide for jurisdiction over the subject matter in such cases. The same precaution doubtless prompted Congress to confer general jurisdiction in common with state Courts over suits contemplated by Section 70e, in cases where consent to the personal jurisdiction was made a prerequisite to the exercise of general jurisdiction over the subject."

In **Palmer v. Roginsky, et al., District Court, S. D. New York, 175 Fed. Rep., 883.** Hand District Judge said:

"This case raises the question of the jurisdiction of this Court, regardless of the defendant's

consent, over a suit by a trustee in bankruptcy, against a fraudulent transferee of the bankrupt when the right depends upon the State law, and not the Act of 1898, (Act of July 1, 1898, c. 541, 30 Stat. 544, [U. S. Comp. St. 1901, p. 3418]). The amendments of 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797, [U. S. Comp. St. Supp. 1909, p. 1308]), as they passed the House of Representatives, gave jurisdiction in the case of transfers fraudulent under either the act of Congress or the State law, but the Senate changed Section 23b by striking out the jurisdiction in the cases under Section 70e, which permits the trustee to recover property fraudulently conveyed under the State law.

"Of course, I cannot say just what scruple induced the Senate to change the form of Section 23b, nor is it in the least necessary that I should know, because I think that their intent was clear to limit the jurisdiction of this Court to cases in which the right relied upon was the creation of the bankruptcy act. Were it not for the fact that the jurisdiction, which remained under Section 70e if the defendant consented, cannot be conferred by consent if the Constitution did not authorize it, one might suppose that some constitutional question had arisen in the mind of Congress. In any case, I am disposed to follow **Gregory v. Atkinson, (D. C.) 127 Fed., 183, Hull v. Burr, 153 Fed., 945, 83 C. C. A., 61,** and **Skewis v. Barthell (D. C.) 152 Fed. 534.**

"**Hurley v. Devlin (D. C.) 149 Fed. 268** and the text of **Remington on Bankruptcy, p. 1040, sec. 1689,** a writer of the highest authority, take the opposite view. The argument made would have undoubtedly much force, were it not for the history of this bill. It is quite true that under the construction I have adopted the amendment of 1903

to Section 70 e really effects no change in the law, and this result violates a well-known canon of construction However, no one could say, if Sec. 70e had remained unchanged, that the changes in 23b, particularly after the Senate struck out all reference to 70e, left unaffected the jurisdiction of this Court by consent. Section 23b having been changed, and singularly changed from any point of view, it is not quite adequate to the facts to say that no change was necessary in Section 70e. I think that some change was necessary to remove all ambiguity as to the jurisdiction by consent over cases arising under 70e, and I believe that this was the reason why the Senate allowed this section to be changed in form, though it remained in effect as before."

In **Skewis v. Barthell, 125 Fed. Rep., 537, Reed, D. J. N. D., Iowa,** says:

"Some further changes were made in other sections, and as so changed the amendment passed the Senate, and these changes were agreed to by the House, and as so amended it was finally passed and approved. **Congressional Record, Vol. 36 pt. 1, pp. 1034, 1035, 1036,** under date of January 21, 1903. **Collier on Bankruptcy, (5th Ed.) pp. 266-573; Brandenburg on Bankruptcy, (33rd Ed.) p. 369, Section 578.**

"The omission of 70e, as amended, from the amendment to Section 23b, therefore, was not accidental but was designedly done. That the State Courts of general jurisdictian may, in proper cases, exercise their jurisdiction over a defendant without his consent, is, no doubt, true; but the national Courts have and can exercise only such jurisdiction as Congress sees fit to confer upon them, and it

> does not follow that, because jurisdiction of the subject matter of a suit is conferred upon a Court of the United State, concurrent with that of a State Court, that it may exercise that jurisdiction without the consent of the defendant in the suit."

And to the same effect was the opinion expressed by Judge Martin of the United States District Court, District of Vermont in **Parker v. Sherman, 195 Fed. Rep. 648.**

It will thus be seen that by a line of strong decisions, dissented from only by District Judge Pollock (**Hurley v. Devlin**), the jurisdiction of the Bankruptcy Court under Section 70, sub-division e, under the Amendment of 1903, has been held to rest only upon the consent of the proposed defendant.

And Congress has shown that this was its intention.

There was a reason for differentiating between the jurisdiction of the United States Courts under these different sections of the Bankruptcy Law. Sub-division b of Section 60 and sub-division e of Section 67 conferred jurisdiction in cases arising under federal statutes, while sub-division e of Section 70 conferred jurisdiction in cases arising under the State Laws. It was for this reason, apparently, that the jurisdiction of the United States Courts was made to depend upon the consent of the defendant in the last case.

Now Congress has set the entire matter at rest. The amendment of June 25, 1910, confers jurisdiction on the United States Courts under sub-division e, of Section 70 without the consent of the defendant. This affirmative action on the part of Congress means that in the opinion of that body the jurisdiction did not exist before. But Section 14 of the Amendment of 1910, removes all doubt,

since it provides that the amendments then enacted must not be held to apply to pending suits Had Congress simply intended to make clear an ambiguous action of a previous session, provision would have been made to have the action taken apply to pending suits, rather than exclude its application to pending suits, as was done in this case.

III.

Argument of Complainant Answered.

Learned counsel in their brief at page 6, state that "some of the aspects of the present case would fall within the terms of Section 60, subdivision b as amended by the Act of 1903."

In the lower Court, by brief, and in oral argument they took the position that their suit was filed under Section 70, subdivision e. The opinion of the Judge **a quo** so states. The above statement quoted from their brief is clearly an afterthought.

The bill alleges that the property was passed to the defendants on **June 6, 1906.** Leche went into bankruptcy on **November 3, 1909.** A reading of the whole complaint shows that it was alleged to be a conveyance in fraud of the creditors that the Court is asked to set aside under the State law, not a preference reprobated by the bankruptcy law.

Learned counsel also cite in support of the jurisdiction of the United States Court in this case **Whitney v. New-**

man, 198 U. S. 539 Hawkins v. Sanderson, 132 Fed. 415-416; Leeds Woolen Mills 129 Fed. 922, 926; Pond vs. N. Y. Nat. Exch. Bank, 124 Fed. 992; Lawrence vs. Lowrie, 133 Fed. 995; Delta Natl. Bank v. Easterbrook, 133 Fed. 521; 36 Statutes at Large, p. 840; Muller v. Nugent, 184 U. S. 1.

None of these authorities have any bearing on the present case, excepting the 36 Statutes at Large, page 840, the amendment to the bankruptsy Act of 1910, which we have already argued favors our contention entirely.

All of these cases rest either on the difference of residences or the parties, or the fact that the property of the bankrupt had come **in custodia legis**, or on the direct bearing of the Amendments of 1903, other than the amendment in question in this case. In the case of **Delta Natl. Bank v. Easterbrook**, the Circuit Court of Appeal dismissed the appeal and no question of jurisdiction of the lower Court was decided.

For these reason we believe that the judgment of the lower Court is correct and should be affirmed.

Respectfully submitted,

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